

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

WELLS FARGO BANK, NA
C/O NAI MID-MICHIGAN,

Plaintiff/Counter-Defendant,

No. 17-547-CB

v

GUIDO'S PREMIUM PIZZA, INC., and
STEVE POLLARD, jointly and
severally,

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Defendants/Counter-Plaintiffs.

At a session of said Court held in Lansing, Ingham
County, Michigan, on December 21, 2018

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This matter began in District Court with a bench trial and was removed to Circuit Court when it was determined that damages could exceed the District Court jurisdiction. In Circuit Court a bench trial was held on the issue of damages, exclusive of attorney fees. The matter was taken under advisement to issue these Findings of Fact and Conclusions of Law. Although the damages issue before the Court is a narrow one, this case has a more complicated history that is necessary to relate here.

Factual history

On July 16, 2015, Wells Fargo became the owner of the Central Park Shopping Center in Okemos, Michigan by way of sheriff's deed on mortgage sale. Wells Fargo then

engaged NAI Mid-Michigan as its property management company for the shopping center.

On May 5, 2016, Plaintiff, as landlord, and Guido's, as tenant, executed a lease agreement for suites G-2 and G-3 located within the shopping center. Defendant Pollard executed a personal guaranty providing that he would fulfill Guido's obligations under the lease.

The lease called for payment of rent at the rate of \$1,883.43 and monthly common area charges of \$984.55. The lease also required that Guido's pay a monthly installment of \$370.42 toward past due rent owed to Plaintiff under a previous lease. The total amount of past due rent at the time of the execution of the lease was \$22,225.69.

The lease also provided that Plaintiff would receive a security interest in Guido's personal property, equipment and trade fixtures located on the leased premises to secure the payment of past due rent, current rent, and future rent. Plaintiff perfected its security interest with the filing of a UCC-1 that covered all assets of Guido's. In addition to Plaintiff's security interest, Guido's business property was also subject to liens by the State of Michigan and the United States Department of Treasury and there were unpaid Meridian Township personal property taxes.

Mr. Pollard placed an advertisement on Craigslist for the sale of his restaurant and equipment.¹ Matthew Gillett responded to that listing and some negotiations ensued. Mr. Gillett represented Saddleback, the owner of barbeque restaurants, and the intent was to

¹ The testimony about the circumstances surrounding the negotiations and the lock-out comes from the bench trial in District Court, which is part of the record in this case. That includes the testimony of Mr. Gillett, which Defendants wanted to admit during the Circuit Court trial on damages. However, counsel requested that the *deposition* of Mr. Gillett be admitted. The *deposition* is not admissible unless it falls under a hearsay exception. Perhaps counsel misspoke and wanted the Court to consider the previous *trial testimony* of Mr. Gillett. The *trial testimony* of Mr. Gillett is part of the record of this case and is properly considered no different than it would be if the trial had not been bifurcated.

operate one of those restaurants in Guido's space. In late October, 2016, Mr. Gillett and Mr. Pollard began talking about a sale. They discussed a sale price of \$40,000 for the equipment. However, in December, 2016, when Mr. Gillett learned that he would have to assume the past due amounts under the lease, he terminated the negotiations.

Mr. Weaver was managing the property for NAI Mid-Michigan on behalf of Wells Fargo. Mr. Gillett had contacted Mr. Weaver in the course of the negotiations with Mr. Pollard. Once the negotiations ceased, Mr. Gillett informed Mr. Weaver of that and also told him that Mr. Pollard said he was going to close his business. Mr. Gillett also informed Mr. Weaver that Mr. Pollard had again listed his business for sale on Craigslist.

When Mr. Weaver became aware that Mr. Pollard had listed the business for sale on Craigslist he became concerned because Plaintiff had a security interest in all the assets. Mr. Weaver made multiple trips to the restaurant over a 3-day period, but it was not operating and nobody was present. On December 15, 2016, Plaintiff changed the locks on the leased premises.

Procedural history

Plaintiff filed a Complaint to recover possession of the property in 55th District Court. Defendants filed a Counter-Complaint alleging that Plaintiff had violated the anti-lockout statute, MCL 600.2918. A bench trial was held and the District Court found that Plaintiff had unlawfully locked Guido's out of the leased premises. A debate ensued about disposition of the original claim to recover possession. In the context of that dispute, the District Court ordered that rent be paid into an escrow account and that the issue of possession would be dealt with at a future hearing. In the meantime, the District Court agreed that there was a potential counterclaim for damages in excess of \$25,000 and the

case would have to be sent to Circuit Court. The issue of possession was subsequently resolved with a stipulation in District Court with possession given to Plaintiff.

Circuit Court proceedings

Plaintiff filed a First Amended Complaint alleging breach of contract and breach of Mr. Pollard's personal guaranty. Defendants' First Amended Counter-Complaint stated claims for statutory and common law conversion of the personal property at the leased premises and tortious interference with a business relationship. Plaintiff's motion for summary disposition was granted with respect to the Counter-Complaint. The basis for that ruling was that the property at the leased premises was subject to a UCC lien and could not be converted by Plaintiff's lawful act of exercising its right to attach and sell the property. Further, the testimony of Mr. Gillett was unrefuted and he said that he terminated negotiations with Mr. Pollack solely because he learned that he would have to assume the past due amount owing under the previous lease. There was no evidence that Plaintiff tortuously interfered with the negotiations. Plaintiff's motion for judgment on its First Amended Complaint was granted as to liability but there were issues of fact with respect to the amount of damages. A bench trial was held on the issue of damages. The Court ordered that any issue of attorney fees owed under the terms of the lease would be addressed separately after the bench trial on damages.

At the damages trial, the testimony of Ann Ray was received. Ms. Ray is the senior vice president and servicing officer of C3 Asset Management. C3 Asset Management is the servicing agent on the loan for which Wells Fargo held the mortgage. The May 2016 lease between Guido's and Wells Fargo is a triple-net lease that has provisions for late fees, utility payments, and it includes rent past due from a prior lease (Plaintiff's Ex. 1).

The total amount of past due rent is attached to the lease as exhibit E. The lease provides that the past due rent was payable in monthly payments.

Ms. Ray testified about the amounts due under the lease and explained the ledger that she kept (Defendants' Ex. A). The first payment under the lease was due June 1, 2016. The payment was made in mid-July and it was for \$5,500, which was short of the amount due. The August payment was also short. Four checks were returned for non-sufficient funds. Additional rent became past due and late fees accrued. Utilities were not paid. The total of all amounts owed from June, 2016, to May, 2017, was \$55,322.13. That does not include legal fees, which are also recoverable under the lease. The total of all amounts due from June, 2016, to the time of the lock-out in December, 2016, was \$37,117.23.

Ms. Ray also testified about the auction of the property on the leased premises. NAI, as the managing agent for Wells Fargo, had an appraisal done that put the value of the property at \$16,430 (Ex. B). The appraisal included a listing of all equipment. Mr. Weaver testified that the auction produced \$3,965. The proceeds went to pay the expenses of the auction house as well as to Meridian Township for back taxes and to the State of Michigan and the Federal Treasury to pay tax liens. Wells Fargo retained no money from the sale of the equipment.

Mr. Pollard testified that the appraisal did not cover two hood systems and two rooftop air conditioners that were on the property. He valued the hoods at \$20,000 each and the air conditioners at \$5,000 each. Mr. Pollard testified that he advertised his equipment for sale for \$69,000 but he was willing to take \$50,000 from Mr. Gillett. Further, Saddleback did ultimately occupy the leased premises after the lock-out and auction. Mr.

Pollard claimed that he was inside after the auction and saw both hoods and both air conditioners still there and not sold.

Plaintiff objected to the testimony of Mr. Pollard because the issue of the equipment on the premises was already addressed in Plaintiff's motion for summary disposition and Defendants' conversion claims were dismissed. The Court notes that if the hood and air conditioners were on the property, Wells Fargo would have held a security interest in them as it did with all property of Guido's. But Defendants' issue appears to be that this property could have also been auctioned and the proceeds used to extinguish Defendants' obligations under the lease.

The Court has considered the issue raised by Defendants despite the disposition of the conversion claims but finds that Mr. Pollard's testimony is not credible. First, Mr. Gillett testified that they were negotiating a sale price of \$40,000. Mr. Pollard's testimony that the hoods and air conditioners were valued at \$50,000 is wholly inconsistent with the amount for which he was willing to sell all the equipment on the premises. Furthermore, the amount is based on nothing more than a lay opinion of Mr. Pollard with nothing to support it and everything to contradict it. Second, even if the hoods and air conditioners had been there, who is to say they would have sold for \$50,000. If they had sold for any significant amount, Wells Fargo would not have retained the funds in light of the substantial tax liens on the property. But none of the other equipment was appraised at such a value and none of the other equipment sold at anything close to the appraised value. Third, the Court finds the claim that Mr. Pollard was on the property and saw this equipment still there to be dubious. He provides no other evidence that he obtained this equipment or that the equipment was on the premises after the auction. The appraiser

prepared a detailed list of equipment on the premises and no hoods or air conditioners are listed. The appraiser's list carries more weight on this issue.

Damages

On the issue of damages, Plaintiff's position is that it is owed \$55,322.13 under the lease from June, 2016, to May, 2017. However, the Court has previously expressed skepticism as to how Plaintiff can claim rent past December 2016 since the District Court found that Plaintiff unlawfully locked Guido's out in December. Plaintiff argues that the lease was never terminated and the District Court ordered rent to be paid in escrow. Plaintiff acknowledges that the amount due under the lease as of December 1, 2016 is \$37,117.23. Defendants maintain that nothing should be owed after the lock-out and that Ms. Ray's ledger supports only \$14,479.74 being owed as of December 1, 2016. Defendant has no objection to the amount of past due rent owed.

Plaintiff has presented no authority for the position that rent should continue to accrue after the tenant was unlawfully locked out. Instead, Plaintiff points to the District Court order that rent be continued to be paid into an escrow account. The Court does not find the payment of rent into escrow to be dispositive. The rent was paid into escrow because the parties were still engaged in a dispute over possession of the premises. In this context, escrow payments were not an acknowledgement that rent was still owing but rather an acknowledgement that the matter was in dispute.

The Court can find no logic or legal basis as to why a tenant would be liable for rent after being unlawfully locked out of the premises. Therefore, the Court concludes that rent is owed under the lease for seven months from June 1, 2016, up to and including the December 1, 2016 payment. Based on the testimony of Ms. Ray and the

corresponding provisions in the lease, the Court finds the following calculation of the amount due to be accurate:

Base rent	\$ 1,883.43
Net charges	<u>984.55</u>
	2,867.98
	<u>x7</u>
Total rent/net due for 7 months	\$20,075.86
Credit for payments made	<u>7,700.00</u>
Total rent/net due for 7 months	\$12,375.86
Late fees for 7 months (\$161.92/mo)	1,133.44
Unpaid utilities	1,282.24
NSF fees	100.00
Back rent from prior lease	22,225.69
Total amount due	\$37,117.23

IT IS HEREBY ORDERED that Plaintiff is entitled to the sum of **\$37,117.23** under the lease exclusive of attorney fees.

IT IS FURTHER ORDERED that if Plaintiff is requesting attorney fees under the lease, it shall file a motion for attorney fees properly supported as set forth in *Smith v Khouri*, 481 Mich 519 (2008) and Defendants' objections shall be specific as to the reasonableness of the hourly rate and specific as to the reasonableness of the number of hours.

/S/

Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on December 21, 2018.

/S/

Ann Baird
Judicial Assistant